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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 211

MARVIN DELANE WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 315 F. 2d 113.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6) was entered on March 11, 1963. A petition for rehearing was denied on April 18, 1963. By order of Mr. Justice Douglas, the time for filing a petition for certiorari was extended to and including June

17, 1963. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the inference that petitioner was in possession of narcotics and that he received, concealed or transported narcotics.

2. Whether this Court should reconsider its decisions (a) upholding the constitutionality of the statutory presumptions arising from possession of narcotics and (b) holding it unnecessary to corroborate the testimony of an accomplice.

3. Whether there was plain error in the instructions of the court.

4. Whether argument of counsel, to which there was no objection, constituted plain error.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of selling and facilitating the sale of five grams, 200 miligrams, of heroin, known to have been unlawfully imported, and of receiving, concealing and facilitating the concealment and transportation of such heroin (21 U.S.C. 174). Consecutive sentences of imprisonment for five years were imposed on each count (II R. 2, 86). The court of appeals affirmed, *per curiam*.

1. The evidence may be summarized as follows: Keith Wallace, a special employee of the Bureau of Narcotics, testified to making arrangements with petitioner for the purchase of heroin at a Los Angeles drive-in on June 22, 1959. Before keeping his appointment, federal agents searched Wallace and his car and gave him one hundred dollars for the purchase (I R. 12-14). Wallace met petitioner as planned at the drive-in and the two drove off together. Petitioner took the one hundred dollars and instructed Wallace that he would find the narcotics concealed under a wash basin at a described filling station (I R. 14, 31). Wallace attempted to follow his directions, but failed to find the narcotics at the station he believed to be the one described or at another station across the street. He then returned to his apartment and told the agents what had happened (I R. 15, 33-34). After a further search of his person and car, Wallace went to West Hollywood where he found petitioner and received additional directions as to how to reach the filling station in question. Following these directions, he found, under the wash stand, a package which he turned over to the agents (I R. 16-19). The substance, when analyzed by a government chemist, proved to be heroin (I R. 10, 56). There was no testimony on behalf of petitioner.

2. Petitioner attacks as prejudicial the following excerpts from the closing argument of the assistant United States attorney, none of which were objected to at the time:

> Let us take a look at the chief witness for the government, Keith Wallace. Indeed, the sur-

veillance of this narcotics case is imperfect. There is no direct agent buy in this case where an agent can testify, get on the stand and testify that he bought narcotics or he overheard a conversation. We are not dealing here with East Los Angeles, simple marijuana peddlers, these are West Los Angeles people, clever. No agent gets in with these people, must use informants. That's part of the game. It's a necessity [I R. 112].

Remember something else; under our rules, his earlier statements are available. He was cross-examined and he could have been cross-examined on any earlier statements had he differed from them greatly. This must be the same story he has originally told [I R. 115].

I don't say that he (Wallace) is a noble citizen in our community. He certainly is not. Noble citizens aren't in the narcotics business, aren't able to make buys. Of course, the agents remembered the exact details better than Wallace. They are trained to do so [I R. 116].

I would like some day to open a narcotics file on my desk and find out that the chief informant for the Government is the President of the Bank of America and he has gone out and made a buy. You don't get people like that; you don't use them as informants [I R. 125-126].

The way these people do business, they have very little conversation to make a sale. * * * In fact that's the way they do business, as little conversation as possible. * * * Remember, there is very little conversation needed when narcotics sales take place, almost none [I R. 126-127].

> It is indeed not a perfect case. There is no Fargo Device and counsel makes a point, why didn't you have a transmitting device. They happened to have one device for 40 agents. They are often not used in these cases, as you can suppose [I R. 129].
>
> You see a dozen informants take the stand and they are not eager witnesses [I R. 129].

The court, after instructing extensively as to the government's burden to prove guilt beyond a reasonable doubt and that no inference was to be drawn from petitioner's failure to take the stand (I R. 139-141), further told the jury (I R. 142):

> A defendant is not required to prove a fact beyond a reasonable doubt, nor by a preponderance of the evidence. It is enough if the evidence he produces is sufficient to create in the minds of the jurors a reasonable doubt with respect to any of the facts essential to constitute the offense.

Petitioner's counsel had earlier told the court (I R. 100), "Undoubtedly the general instructions that you give would be satisfactory." At the conclusion of the charge, he stated that there were no objections (I R. 147).

ARGUMENT

1. The evidence, which showed that petitioner negotiated the sale of narcotics, accepted the money and gave the government informer correct and explicit directions as to where to find the secreted narcotics, showed such dominion and control by petition-

er as to give rise to the statutory presumption arising from possession. *United States* v. *Wright*, 309 F. 2d 735, 738 (C.A. 7); *Cellino* v. *United States*, 276 F. 2d 941, 946 (C.A. 9); *Sykes* v. *United States*, 312 F. 2d 232 (C.A. 8), certiorari denied, May 27, 1963, No. 1086 Misc., O.T. 1962.

2. There is no occasion for the Court to reconsider its holding that the testimony of an accomplice need not be corroborated (*Caminetti* v. *United States*, 242 U.S. 470) in view of the record here which shows that Wallace was not an accomplice and that his testimony was, in any event, amply corroborated. Nor is there occasion for review of the holding of the Court that the statutory presumption arising from possession of narcotics is constitutional. *Yee Hem* v. *United States*, 268 U.S. 178 (see government brief in opposition, *Jennings* v. *United States*, No. 840 Misc., O.T. 1962, certiorari denied, June 17, 1963). The instruction of the trial court as to this presumption, to which there was no objection, was in the language of 21 U.S.C. 174.

3. Also given without objection was an instruction that petitioner need not prove a fact beyond a reasonable doubt or by a preponderance of the evidence, but that it was sufficient if he created a reasonable doubt in the minds of the jurors. It did not imply any duty on his part to testify and a specific instruction as to the absence of such a duty was given. The instruction was beneficial to petitioner.

4. The criticism of various portions of the Assistant United States Attorney's closing argument, to which no objection was made in the district court,

is unsound. Certainly, there was no "plain error" under Rule 52, F.R. Crim. P. The reference to the locality in which petitioner conducted his operations was incidental to the explanation of the need to use an informer. Nor was there any indirect testimony by the attorney as to his personal experience. The explanation as to the non-use of a recording or transmitting device to corroborate the testimony of the special employee was proper in view of defense counsel's criticism of the government's failure to produce such evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1963.

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